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No. 90-804

Supreme Court, U.S.

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JOSEPH P. SPANGL, JR.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

ALLEN L. FEINGOLD,

Petitioner

v.

DISCIPLINARY BOARD OF THE
COMMONWEALTH OF PENNSYLVANIA,

Respondent

On Petition For Writ of Certiorari To
The Supreme Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

Office of Disciplinary Counsel
of the Disciplinary Board of the
Supreme Court of Pennsylvania

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I. COUNTER-STATEMENT OF QUESTION PRESENTED

Should the Court deny certiorari to review the Order of the Supreme Court of Pennsylvania denying Petitioner's Petition for Review from an Order of the Disciplinary Board requiring your Petitioner to pay the expenses incurred in the investigation and prosecution of allegations of professional misconduct where the issue presented in the Petition for Writ of Certiorari was not raised, argued or considered in the disciplinary proceedings before the Supreme Court of Pennsylvania, its Disciplinary Board or Hearing Committee.

II. TABLE OF CONTENTS

	Page
I. Counter-Statement of Question Presented...	i
II. Table of Contents.....	ii
III. Table of Authorities.....	iii
IV. Counter-Statement on Jurisdiction	1
V. Counter-Statement of the Case	2
VI. Summary of Argument.....	3
VII. Argument.....	4
THE COURT SHOULD DENY CERTIORARI TO REVIEW THE ORDER OF THE SUPREME COURT OF PENNSYLVANIA DENYING PETITIONER'S PETITION FOR REVIEW FROM AN ORDER OF THE DISCIPLINARY BOARD REQUIRING YOUR PETITIONER TO PAY THE EXPENSES INCURRED IN THE INVESTIGATION AND PROSECUTION OF ALLEGATIONS OF PROFESSIONAL MISCONDUCT WHERE THE ISSUE PRESENTED IN THE PETITION FOR WRIT OF CERTIORARI WAS NOT RAISED, ARGUED OR CONSIDERED IN THE DISCIPLINARY PROCEEDINGS BEFORE THE SUPREME COURT OF PENNSYLVANIA, ITS DISCIPLINARY BOARD OR HEARING COMMITTEE.....	
VIII. Conclusion	7

III. TABLE OF AUTHORITIES

<i>Cases:</i>	Page
<i>Amalgamated Food Employees Union v. Logan Valley Plaza</i> , 391 U.S. 308 (1968)	5
<i>Heath v. Alabama</i> , 474 U.S. 82 (1985)	4
<i>Cardinale v. Louisiana</i> , 394 U.S. 437 (1969)	4
<i>Illinois v. Gates</i> , 462 U.S. 213 (1983)	4
<i>McGoldrick v. Compagnie Generale Transatlantique</i> , 309 U.S. 430 (1940)	4
<i>State Farm Mutual Insurance Company v. Duel</i> , 324 U.S. 154 (1945)	4
 <i>Statutes:</i>	
28 U.S.C. §1257(a)	1, 4, 5
 <i>Rules of Procedure:</i>	
A. SUPREME COURT RULES	
Rule 10	4
Rule 14.1(h)	3, 4, 6
B. PENNSYLVANIA RULES	
PA.R.A.P. 102	6
PA.R.A.P. 522	6
PA.R.D.E. 208(g)	2, 6
PA.D.BD.R. §89.205(b)	2, 6

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IV. COUNTER-STATEMENT ON JURISDICTION

Because the Petitioner did not raise or argue any substantial federal question with respect to Pennsylvania Rule of Disciplinary Enforcement 208(g)(2) before the Pennsylvania Supreme Court, its Disciplinary Board or Hearing Committee, the question presented for review set forth in the Petition for Writ of Certiorari is not properly before the Court for review under 28 U.S.C. §1257(a).

V. COUNTER-STATEMENT OF THE CASE

The Office of Disciplinary Counsel of the Disciplinary Board of the Supreme Court of Pennsylvania filed two Petitions for Discipline containing a total of eight charges, each involving a separate client, against the Petitioner. They were docketed at No. 34 DB 86 (five charges) and No. 19 DB 87 (three charges).

Following 14 days of hearings, the Hearing Committee of the Disciplinary Board of the Supreme Court of Pennsylvania filed a Report and Recommendation with the Disciplinary Board. In its Report and Recommendation, the Hearing Committee found that the Petitioner violated four separate Disciplinary Rules of the Code of Professional Responsibility in his representation of four individual clients. In an opinion dated August 9, 1990, the Disciplinary Board adopted the findings and recommendation of the Hearing Committee. On that same date, over the signature of John A. Tumolo, Chairman, the Disciplinary Board ordered that the Petitioner be subjected to a private reprimand by the Disciplinary Board of the Supreme Court and pay the costs of investigation and prosecution.

By letter dated August 9, 1990, copies of the Opinion and Order of the Disciplinary Board were forwarded to the Petitioner by the Secretary of the Disciplinary Board, Nan M. Cohen. Ms. Cohen's letter also advised the Petitioner that he had been ordered to pay the costs of prosecution pursuant to Pennsylvania Rule of Disciplinary Enforcement 208(g). A "Notice of Taxation of Expenses" was also enclosed. The costs contained in the notice are each clearly within §89.205(b) of the Disciplinary Board Rules.

The Petitioner filed a Petition for Review with the Supreme Court of Pennsylvania. The Office of Disciplinary Counsel, on behalf of the Disciplinary Board of the Supreme Court of Pennsylvania, filed an answer to the

Petition for Review. The Petitioner filed a reply to Disciplinary Counsel's answer to his Petition for Review. Petitioner did not raise any federal constitutional issue or substantial federal claim in any of his pleadings filed with the Pennsylvania Supreme Court.

In a per curiam Order dated October 3, 1990, the Petitioner's Petition for Review was denied by the Supreme Court of Pennsylvania.

VI. SUMMARY OF ARGUMENT

The Court should not grant certiorari to review the Order of the Pennsylvania Supreme Court denying the Petitioner's Petition for Review of the Order of the Disciplinary Board of the Supreme Court of Pennsylvania because the Petitioner has not preserved any substantial federal question for review.

Under Supreme Court Rule 14.1(h), the Petitioner is required to specify at what stage of the proceedings in the Pennsylvania Supreme Court he raised the federal questions he now seeks to have reviewed, the manner in which he raised them and the way in which they were passed upon by the Pennsylvania Supreme Court. The Petitioner did not address any of these issues. He could not have discussed them in his Petition for Writ of Certiorari because he never raised or argued the matter raised in his Petition before the Pennsylvania Supreme Court. As a consequence, the Pennsylvania Supreme Court has not ruled on any constitutional issue or other substantial federal claim. Therefore, no federal constitutional issue or substantial federal claim is properly before the Court for review.

VII. ARGUMENT

THE COURT SHOULD DENY CERTIORARI TO REVIEW THE ORDER OF THE SUPREME COURT OF PENNSYLVANIA DENYING PETITIONER'S PETITION FOR REVIEW FROM AN ORDER OF THE DISCIPLINARY BOARD REQUIRING YOUR PETITIONER TO PAY THE EXPENSES INCURRED IN THE INVESTIGATION AND PROSECUTION OF ALLEGATIONS OF PROFESSIONAL MISCONDUCT WHERE THE ISSUE PRESENTED IN THE PETITION FOR WRIT OF CERTIORARI WAS NOT RAISED, ARGUED OR CONSIDERED IN THE DISCIPLINARY PROCEEDINGS BEFORE THE SUPREME COURT OF PENNSYLVANIA, ITS DISCIPLINARY BOARD OR HEARING COMMITTEE.

Review on Writ of Certiorari is a matter not of right, but of jurisdictional discretion, and will be granted only when there are special and important reasons therefor. Supreme Court Rule 10. Under 28 U.S.C. §1257(a), this Court has jurisdiction to review the final judgment of the Pennsylvania Supreme Court where that judgment involves the denial of any federal constitutional right or privilege. However, where the alleged infringement of the constitutional right or privilege was not raised, argued or considered in the proceedings below, your jurisdiction should not be exercised. *Heath v. Alabama*, 474 U.S. 82 (1985); *Illinois v. Gates*, 462 U.S. 213 (1983); *Cardinale v. Louisiana*, 394 U.S. 437 (1969); *State Farm Mutual Insurance Company v. Duel*, 324 U.S. 154 (1945); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430 (1940).

For this Court to review a state court judgment on Writ of Certiorari, the federal question sought to be reviewed must have been timely and properly raised in the state court proceedings. Supreme Court Rule 14.1(h) requires a petitioner to set forth in his Petition for Writ of Certiorari the stage of the proceedings where

the federal questions were raised, the method and manner of raising them, and how they were passed upon by the court, with specific references to the places in the record where the matters appear. Petitioner's pleading is devoid of such references to the record.

In his Petition for Writ of Certiorari, the Petitioner lists one question presented for review. It is:

. . . . whether a state court rule which governs the conduct of proceedings seeking to discipline attorneys accused of wrong-doing and which imposes the entire cost of prosecution on the attorney, even though the attorney has been exonerated of most of the charges which had been filed against him, violates the Fifth and Fourteenth Amendments to the United States Constitution since the rule provides no standards by which costs are to be assessed and denies the attorney a hearing to challenge the assessment.

For purpose of certiorari under subsection (a) of §1257, the validity of the state statute must have been "drawn in question," or a federal title, right, privilege, or immunity must have been "specifically set up or claimed." As noted earlier, the instant Petition contains no reference to how the "claim" was treated in the state court because Petitioner did not make so much as an allusion to federal constitutional claims until he raised them in the instant petition.

Furthermore, Petitioner failed to comply with state rule concerning the method of raising constitutional challenges to court rules. As stated in Mr. Justice Harlan's dissent in *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968), 334, in determining whether a question was "substantially set up or claimed" within the meaning of §1257, "it is

relevant and usually sufficient to ask whether petitioner has satisfied the state rules governing presentation of issues."

The Petitioner has not satisfied the applicable state rule. The Petitioner challenges the validity of a state Supreme Court Rule of Disciplinary Enforcement and, presumably, the Disciplinary Board Rule implementing its provisions. Rule 522 of the Pennsylvania Rules of Appellate Procedure, entitled "Notice to Court Administrator of Pennsylvania of Challenge to Constitutionality of General Rules," requires that:

It shall be the duty of a party who draws in question the constitutionality of any general rule to give notice in writing to the Court Administrator of Pennsylvania in accordance with the procedure prescribed in Rule 521 (Notice to Attorney General of Challenge to Constitutionality of Statute).

Pennsylvania Rule of Appellate Procedure 102 defines "general rule" as "a rule or order promulgated by or pursuant to the authority of the Supreme Court." Under this definition, both Pa.R.D.E. 208(g) and §89.205(b) of the Disciplinary Board Rules are "general rules." Petitioner did not comply with Pa.R.A.P. 522.

Thus, the record before the Court is completely devoid of any reference to any federal constitutional claim or other substantial federal claim raised by Petitioner in the state disciplinary proceedings. Indeed, his pleadings to the Supreme Court of Pennsylvania do not contain even a reference to his rights under the United States Constitution. Rather, he has chosen to assert a claim of denial of federal rights for the first time in his Petition for Writ of Certiorari. By doing so, he has failed to comply with Supreme Court Rule 14.1(h) and has denied the Pennsylvania Supreme Court, its Disciplinary Board and Office of Disciplinary Counsel the opportunity to address the validity of any such claim in the state court.

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Since the Petitioner did not raise or argue to the Pennsylvania Supreme Court any issue presented for review contained in his Petition for Writ of Certiorari, the issue was not properly before this Court for consideration and his Petition for Writ of Certiorari should be denied.

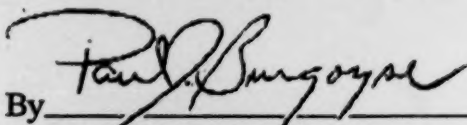
VIII. CONCLUSION

Since the Petitioner did not raise in the Pennsylvania Supreme Court any federal constitutional issue or other substantial federal claim which he now seeks to be reviewed on Writ of Certiorari, the Court should deny his petition.

Respectfully submitted,

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Dated: December 14, 1990